STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LEON JACKSON,

Defendant-Appellant.

UNPUBLISHED
October 16, 2001

No. 222409
Saginaw Circuit Court
LC No. 98-015526-FH

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was stopped by the police for failing to signal a left turn and questioned about whether he had been using intoxicants or drugs. A subsequent search of his vehicle turned up a number of rocks of crack cocaine wedged between the seat cushions of the driver's seat. Following a jury trial, defendant was convicted on one count of possession of less than twenty-five grams of cocaine, MCL 333.7403. The trial court sentenced defendant to a prison term of thirty to forty-eight months, but awarded him no credit for time served. Defendant now appeals as of right, challenging the conviction on various grounds, and in the alternative challenging the failure to award credit. We affirm the conviction, but remand for modification of defendant's judgment of sentence to reflect appropriate credit.

Defendant first argues that the crack cocaine should have been suppressed because it was found as a result of an illegal detention. He reasons that when the police officer began to question him about whether he had open intoxicants or narcotics in the car, there were no facts sufficient to support a finding of reasonable suspicion. He further contends that the continued detention, along with the canine search and subsequent hand search of the vehicle, was illegal. We disagree.

Whether the suspicion giving rise to the officer's questioning of defendant and subsequent canine search was reasonable under the Fourth Amendment is a question of law that this Court reviews de novo. *People v Bloxson*, 205 Mich App 236, 245; 517 NW2d 563 (1994). For law enforcement officers to make a constitutionally proper investigative stop, they must satisfy the two-part test set forth in *United States v Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. *Id*. at 418. That suspicion must be reasonable and articulable, *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed

2d 889 (1968). Furthermore, the authority and limitations associated with investigative stops apply to vehicles as well as people. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). Deference should be given to a trained, experienced law enforcement officer who finds that a suspect's actions suggest he is engaged in illegal activity. *Id.* at 636.

The arresting officer testified that his suspicions were aroused because: (1) before stopping, defendant leaned toward the passenger side of his vehicle to the point where he almost disappeared from the officer's view, suggesting that he was hiding something; (2) defendant's car hit the curb and veered back onto the road before stopping in a very unusual manner; (3) defendant, instead of waiting in his car, got out and twice approached the officer's squad car before being ordered back into his own car; (4) defendant asked to get out of his car to take out his wallet; (5) the officer recognized defendant's name from prior knowledge of him; (6) defendant seemed very nervous and talkative, beyond the normal nervousness of an ordinary traffic stop subject; and (7) defendant seemed to be trying to get the officer away from defendant's vehicle. Under the totality of these circumstances, giving deference to the inferences and deductions of the officer, we are satisfied that the officer presented a reasonable and articulable suspicion that defendant had been or was involved in criminal activity. Accordingly, the trial court did not violate defendant's Fourth Amendment rights by refusing to suppress the cocaine.

Defendant next argues that it was purposeful misconduct for the prosecutor to play sections of a taped interview with the key defense witness at trial.[1] The tape included references to the witness's refusal to take a polygraph test, a reference to potentially impermissible prior act evidence, see MRE 404(b), concerning a prior traffic stop of defendant's car during which heroin and cocaine were found on his passengers, and a reference which revealed that defendant had pleaded guilty to the charge against him.[2] We find no error mandating reversal.

Allegations of prosecutorial misconduct are reviewed de novo. *People v Bahoda*, 448 Mich 261, 267 n 7; 531 NW2d 659 (1995). This Court reviews the admission of evidence for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001).

First, we note that although reference to a polygraph test is inadmissible, it does not always constitute error requiring reversal. *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). To determine if reversal is required, this Court analyzes a number of factors, including:

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[1] According to the defense, this witness had planted the drugs in defendant's car. However, the witness' credibility was effectively destroyed during his cross-examination by the prosecutor. Nevertheless, in part because of the witness' repeated insistence that the prosecutor was misconstruing his responses from a taped interview regarding this story, as part of the prosecution's rebuttal the taped interview was played for the jury.

[2] After defendant's pretrial motion to suppress the cocaine based on an illegal search was denied, defendant entered a conditional guilty plea for which it was stipulated that the search and seizure issue would be preserved for appeal. Defendant later told the court he had been pressured into the plea, and the court allowed him to withdraw from the agreement and appointed a new attorney.

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982), quoting *Rocha*, *supra* at 9.]

These factors are not requirements, but are tools to help guide a court's analysis. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). Reviewing the facts in light of these factors, we find no error requiring reversal.

Second, although pursuant to MRE 404(b), evidence of other crimes or wrongs "is not admissible to prove the character of a person in order to show action in conformity therewith," *Knapp*, *supra* at 378, other acts evidence may be admissible for other purposes. Other acts evidence must be offered for a proper purpose under the rule, the evidence must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). If, under this test, error in the admission of evidence is found, the defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Here, because the contested evidence was introduced as part of a thirty-minute tape played for the jury, it is not clear what, if any, purpose the prosecutor had in offering this specific evidence. It is, however, arguable that any probative value of the prosecutor's reference to defendant's prior act was substantially outweighed by the danger of unfair prejudice. Nevertheless, defendant has failed to carry his burden of showing that more probably than not a miscarriage of justice occurred. *Lukity, supra* at 495. The evidence presented at trial overwhelmingly supported defendant's guilt.

Lastly, we agree that evidence of a withdrawn guilty plea is not admissible. MRE 410; *People v Trombley*, 67 Mich App 88, 92; 240 NW2d 279 (1976). However, where evidence of a plea negotiation has been admitted, a question remains as to whether the error was harmless. *People v Oliver*, 111 Mich App 734, 757; 314 NW2d 740 (1981). To answer this question, a two-part test is employed: (1) was the error so offensive to the maintenance of a sound judicial system as to require reversal, and (2) if not, was the error harmless beyond a reasonable doubt, that is, had the trial been free of the error, is it not reasonably possible that any juror would have voted to acquit? *Id.* In applying the first part of the test, the nature or amount of evidence produced against the defendant is irrelevant. *People v Christensen*, 64 Mich App 23, 33; 235 NW2d 50 (1975). An error which is deliberately injected into the proceedings by the prosecutor weighs in favor of requiring reversal. *Id*.

Here, the reference to defendant's plea was brief and it was not emphasized. Given the circumstances surrounding the playing of the tape, and the need for the entire tape to be heard for contextual purposes, we cannot conclude that the prosecutor deliberately injected the reference to defendant's plea into the trial proceedings. Moreover, because the remaining evidence overwhelmingly supported defendant's guilt, we find that the error was harmless beyond a reasonable doubt.

Defendant additionally contends that various prosecutorial comments rise to the level of misconduct. Because defendant failed to object to these comments, these claims are not preserved and are to be reviewed for plain error. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). We find no plain error affecting defendant's substantial rights.

The only claim of note concerns references during trial to defendant's refusal to consent to a search of his car. There exists a constitutional right to refuse to consent to a search. *People v Stephens*, 133 Mich App 294, 298; 349 NW2d 162 (1984). A defendant's assertion of that right cannot be a crime nor can it be evidence of a crime. *Id*. (citations omitted). However, even assuming error in the reference to defendant's exercise of this right, such error did not result in the conviction of an otherwise obviously innocent person, nor did it "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 763-764. Reversal is unwarranted.[3]

Defendant's final claim of error concerns the trial court's failure to grant him credit for time served while awaiting trial. Our review of the record indicates that credit was denied, and a consecutive sentence imposed, due to defendant's status as a parolee from a Wisconsin conviction. However, where a defendant's parole arises out of an offense and sentence that occurred in another state, credit for time served must be applied to the instant, in-state offense. MCL 769.11b; *People v Johnson,* 205 Mich App 144, 146-147; 517 NW2d 273 (1994). We accordingly remand for modification of defendant's judgment of sentence to reflect appropriate credit.

Defendant's conviction is affirmed. This matter is remanded for action consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

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[3] Because defendant's additional claims are premised on these allegations of prosecutorial misconduct, we find no alternate error mandating reversal. Even assuming defendant's trial counsel was ineffective in failing to object to the prosecutor's actions, the level of representation did not so prejudice defendant that he was deprived of a fair trial. See *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). Furthermore, in light of the substantial uncontested evidence, we cannot conclude that the cumulative effect of the noted minor errors deprived defendant of a fair trial. See *People v Cooper,* 236 Mich App 643, 659-660; 601 NW2d 409 (1999).